

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION

No. 4:95-CR-41-8H

No. 4:97-CV-237-H

BARKLEY GARDNER,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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**ORDER**

This matter is before the court on petitioner's:

1. Motion for Relief from Judgment Pursuant to Rule 60(b)(4)  
and (6), [D.E. #838];
2. Motion to Vacate Under 28 U.S.C. § 2255, [D.E. #886]; and
3. Motion for Appointment of Counsel, [D.E. #887].

These matters are ripe for adjudication.

**I. Motions for Relief from Judgment, [D.E. #838], and to  
Vacate, [D.E. #886]**

In his motion for relief from judgment, [D.E. #838], petitioner attempts to set aside his criminal judgment in case number 4:95-CR-41-8H (E.D.N.C.) based upon Rule 60 of the Federal Rules of Civil Procedure. No such relief, however, may be granted. See Fed.R.Civ.P. 1 (Federal Rules of Civil Procedure only govern procedure in *civil* actions and proceedings); see also United States v. Mosavi, 138 F.3d 1365, 1366 (10th Cir. 2005) (Rule 60(b) of the Federal Rules of Civil Procedure does

not provide relief from judgment in a criminal case). Petitioner's claims in his motion for relief from judgment are in substance a successive motion to vacate his sentence under 28 U.S.C. § 2255. See Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) (Courts may properly treat Rule 60(b) motion as a successive habeas petition). Similarly, petitioner's most recent motion to vacate under 28 U.S.C. § 2255, [D.E. #886], is successive.

Therefore, this court is without jurisdiction to consider either of these motions. See 28 U.S.C. § 2255(h). Accordingly, petitioner's motions to vacate, [D.E. #838 and #886], are DISMISSED WITHOUT PREJUDICE to his right to apply to the Fourth Circuit for leave to file a successive § 2255 motion.

## **II. Motion for Appointment of Counsel**

For insufficient cause shown at this time, petitioner's motion for appointment of counsel, [D.E. #887], is DENIED WITHOUT PREJUDICE.

## **CONCLUSION**

For the foregoing reasons, petitioner's:

1. Motion for Relief from Judgment Pursuant to Rule 60(b)(4) and (6), [D.E. #838], treated by this court as a successive Motion to Vacate Under 28 U.S.C. § 2255, is DENIED WITHOUT PREJUDICE as to his right to apply to the Fourth Circuit for leave to file a successive § 2255 motion;

2. Motion to Vacate Under 28 U.S.C. § 2255, [D.E. #886], is DENIED WITHOUT PREJUDICE as to his right to apply to the Fourth Circuit for leave to file a successive § 2255 motion; and
3. Motion for Appointment of Counsel, [D.E. #887], is DENIED WITHOUT PREJUDICE.

This order does not raise a substantial issue for appeal concerning the denial of a constitutional right. Accordingly, a certificate of appealability is not issued as to this order.

This 26th day of May 2016.



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Malcolm J. Howard  
Senior United States District Judge

At Greenville, NC  
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